Ruling 401-10-7

Issued: April 9, 2010
Effective: April 9, 2010

Ruling 400-05-2, issued May 18, 2005, is hereby withdrawn and replaced by this ruling.

A ruling has been requested concerning the applicability of the New Mexico Gross Receipts and Compensating Tax Act, NMSA 1978, Section 7-9-1, *et. seq*., and the New Mexico Corporate Income and Franchise Tax Act, NMSA 1978, Section 7-2A-1, *et. seq*., to the following facts:

> X is a Nevada corporation engaged in the sale of tangible personal property via a web site accessible through the Internet. X has no sales force and no employees or property in New Mexico. The server for X's web site is located in Ohio. Orders for goods are filled in Texas and sent to X's customers via the U.S. mail.
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> X intends to enter into agreements with other Internet retailers, called "Affiliate Partners," some of whom have web sites maintained on servers in New Mexico. Under these agreements, the Affiliate Partners agree to carry a linked advertisement on their web sites. If a customer browsing that web page "clicks" on the advertisement and links to X's web page, X will pay the Affiliated Partner a commission on any resulting sales. The advertisements do not suggest that X and its "Affiliate Partners" have any connection or affiliation beyond the web link capability.

X asks if it will be subject to New Mexico's jurisdiction for gross receipts and compensating taxes or income-based taxes as a consequence of entering into such agreements with Affiliated Partners using a server in New Mexico.

The Gross Receipts and Compensating Tax Act imposes an excise tax on the gross receipts of anyone "engaging in business in New Mexico." NMSA 1978, Section 7-9-4 (1990). "Engaging in business" is defined (in part) as:

> carrying on or causing to be carried on any activity for the purpose of direct or indirect benefit, except that:
> A. "engaging in business" does not include having a worldwide web site as a third party content provider on a computer physically located in New Mexico but owned by another nonaffiliated person;
> NMSA 1978, Section 7-9-3.3.

The term "nonaffiliated person" is not defined in the Gross Receipt and Compensating Tax Act. In the absence of a statutory definition, one may look to the common or ordinary meaning of a word to ascertain legislative intent. Webster's Third New International Dictionary defines the term "affiliate" to mean "a branch or unit of a larger organization." The apparent purpose of the "safe-harbor" provisions of NMSA 1978, Section 7-9-3.3(A) was to encourage the use of in-state computer services by enterprises that would not otherwise be subjected to

liability for the state's gross receipts and compensating taxes. The web-site advertising linkage and sales commission arrangement between X and its "Affiliated Partners" does not make those entities "a branch or unit" of X's enterprises, as that term is commonly understood, for purposes of Section 7-9-3.3. Accordingly, the advertising link and commission contracts between X and its "Affiliated Partners" do not constitute "engaging in business" in New Mexico for purposes of the Gross Receipts and Compensating Tax Act and do not by themselves subject X to the state's taxing authority for gross receipts and compensating taxes.

X is subject to corporate income tax if X is engaged in the transaction of business in, into or from this state or derives income from any property or employment in this state. NMSA 1978, Section 7-2A-3. This standard is considerably broader than the definition of "engaging in business" in Section 7-9-3.3, above, and contains no "safe-harbor" provision for use of a third-party's web server within the state.

The United States Supreme Court has held that states need "substantial nexus" under the Commerce Clause to impose the obligation to collect compensating tax (and perhaps, gross receipts taxes) on remote sellers. *Quill v. North Dakota,* 504 U.S. 298 (1992). "Substantial nexus" for remote sellers has been construed to mean a non-*de minimis* physical presence in the state. The Court in *Quill* was careful to note it had never extended such a requirement to the imposition of income-based taxes.

In 1959, Congress passed P.L. 86-272 (15 U.S.C.A. Sections 381-384), prohibiting a state from imposing income-based taxes on persons whose only contact with the state was solicitation of orders for tangible property filled and shipped from without the state. X would appear to have immunity for income taxes under that statute based on the limited facts presented.

Because the facts presented by X are incomplete, and because X would appear to enjoy immunity from income tax under federal law, the Department declines to address the question of whether the arrangements with the "Affiliated Partners" standing alone would create jurisdiction to impose income-based taxes.